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CHARLES ELMORE

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1934.

No. 344.

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellant,

vs.

STATE OF FLORIDA and E. S. MATTHEWS, MAMIE EATON-GREENE and W. B. DOUGLASS, ETC., *et al.*,
Appellees.

No. 345.

STATE OF FLORIDA and E. S. MATTHEWS, MAMIE EATON-GREENE and W. B. DOUGLASS, ETC., *et al.*,
Cross-Appellants.

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*,
Cross-Appellees.

MOTION FOR CONSTRUCTION OF OPINION AND CONFORMITY OF MANDATE THERETO.

CARY D. LANDIS,
Attorney General of the State of Florida.

THEO. T. TURNBULL,
Special Counsel, Florida Railroad Commission.

HENRY P. ADAIR,
AUGUST G. GUTHEIM,
R. A. BAKER,
C. G. ASHBY,
Counsel for Brooks-Scanlon Corporation, Wilson Cypress Company, and Cummer Cypress Company, as Cross-Appellants.

J. V. NORMAN,
Counsel for Wilson Lumber Company of Florida, Cross-Appellant.

Of Counsel:
JOHN W. DAVIS.

THE BALLOU PRESS NEW YORK

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TO THE HONORABLE JUDGES OF THE SUPREME COURT OF THE UNITED STATES:

Come now the State of Florida and E. S. Matthews, W. B. Douglass and J. C. Carter, as and constituting the Florida Railroad Commision, and Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company and Wilson Lumber Company of Florida, appellees and cross-appellants herein, and, subject to their petition for rehearing herein and their motion for leave to file supplemental bill in

the nature of a bill of review herein, respectfully show unto the Court:

1. That the opinion of this Court delivered herein on April 29, 1935, in disposing of the claims for restitution upon the basis of the Cummer Scale, asserted that the Court "will stay its hand and leave the parties where it finds them" (p. 9 of said opinion), and further stated:

> "To this the claimants answer that inaction in such circumstances is an assumption by the federal court of legislative powers and an unconstitutional encroachment upon the powers of a sovereign state. The argument misses the significance of equitable remedies. The federal court by its inaction does not trench upon any jurisdiction, legislative or judicial, inherent in the state of Florida. It does not undertake to say that the rates collected by the carrier were lawful in the sense that a suit would lie to recover them if credit had been given to the shipper and a balance were now unpaid. All that the federal court does is to announce that it will stand aloof. It inquires whether anything has happened whereby a court of equity would be moved to impose equitable conditions upon equitable relief. In the course of that inquiry it perceives that the charges were collected under color of legal right, in circumstances relieving the carrier of any stigma of extortion. It discovers through the evidence submitted to the Commission and renewed in the present record that what was charged would have been lawful as well as fair if there had been no blunders of procedure, no administrative delays. Learning those things, it says no more than this, that irrespective of legal rights and remedies it will not intervene affirmatively, in the exercise of its equitable and discretionary powers, to change the status quo. This is not usurpation. It is not action of any kind. It is mere inaction and passivity in line with the historic attitude of courts of equity for centuries" (p. 9 of said opinion).

2. That the Court in said opinion further directed that the cause be remanded with instructions to dismiss the claims

(p. 11 of said opinion); and that in the opinion by the minority of the Court it is said:

> "We are told that restitution is an equitable doctrine and that as the court, upon consideration of all the facts, should hold there was no inequity in the carrier's retaining what it had collected, refusal of a decree is merely to withhold action, as a court of equity is always free to do in such circumstances. But the weakness of this argument is, that by refusing relief the court in effect denies legal rights. It is not suggested that a dismissal of the motion will not be res judicata in any action hereafter brought to recover for overcharges; and if so, the decision in this case is an adjudication by a federal court that the collection of the increased rate was lawful, the invalidity of the Commission's order and the law of Florida to the contrary notwithstanding" (p. 9 of said opinion);

and that the effect of said opinion is thereby rendered ambiguous as to whether the same is *res judicata* of the said claims if asserted in the Courts of the State of Florida, or in the United States District Court sitting in Florida.

3. That in apprehension that inaction might be the course of conduct taken by said District Court for the Northern District of Georgia or by this Court, the appellees and cross-appellants, Wilson Cypress Company, Cummer Cypress Company and Wilson Lumber Company of Florida, on, to-wit, the 13th day of February, A. D. 1934, filed in the proper State Courts of the State of Florida, their separate actions at law against said Atlantic Coast Line Railroad Company for the recovery of said claims, and said causes were thereafter removed by said Atlantic Coast Line Railroad Company to the United States District Court for the Southern District of Florida, and are now pending in said Court.

4. That if this Court "by its inaction does not trench upon any jurisdiction, legislative or judicial, inherent in the State of Florida" it should resolve said ambiguity and in terms declare that the opinion and decision of this Court is not *res*

judicata of any suit elsewhere brought for the purpose of adjudicating said claims upon their merits.

5. Unless such ambiguity is resolved and clarified in this Court upon this appeal, it may be necessary for the plaintiffs or the defendant in said actions at law now pending in said District Courts or other actions which may hereafter be instituted by or on behalf of the claimants in these restitution proceedings to resort to appeals and writs of certiorari to determine whether the opinion, decision and mandate of this Court in this cause is *res judicata* in said actions at law.

WHEREFORE, these appellees and cross-appellants move the Court to clarify the said ambiguity in said opinion and now to determine whether or not it was the intention of this Court that the opinion and decision of this Court should be *res judicata* of any suit elsewhere brought for the purpose of adjudicating said claims upon their merits; and upon such clarification to conform the mandate thereto.

Respectfully submitted,

CARY D. LANDIS,
Attorney General of the State of Florida.

THEO. T. TURNBULL,
Special Counsel, Florida Railroad Commission.

HENRY P. ADAIR,
AUGUST G. GUTHEIM,
R. A. BAKER,
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